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Problemy sravnitel'nogo issledovaniia zakonodatel'stva soiuznykh Respublik

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Reviews

Problemy sravnitel' nogo issledovaniia zakonodatel' stva soiuznykh respublik. Edited by A.I. Ishanov *et al.* Tashkent: izd-vo "FAN" Uzbekskoi SSR, 1974. Pp. 236. Price: 1 ruble, 36 kopecks.

In an earlier contribution to this journal¹ the present writer called attention to growing interest, in the Soviet Union, in the application of the comparative method to the study of Soviet domestic law as evidenced by the appearance of two criminal law texts devoted exclusively to Belorussian and Ukrainian criminal law. The volume herein reviewed elaborates that theme and endeavours to come expressly to grips with the methodological issues implicit in analyzing a single legal system from a comparative standpoint.

The impetus for studying Soviet law from a comparative perspective evidently dates from the late 1960s and owes much to the efforts of Uzbek jurists. The research tasks of the Comparative Law Sector of the Institute of Philosophy and Law of the Uzbek Academy of Sciences received the formal sanction of the State Committee for Science and Technology of the USSR Academy of Sciences in 1968; these include: (a) the theoretical study and generalization of the experience of socialist construction in the union republics using the comparative method; (b) identifying the general societal laws of development and specific peculiarities in union republic constitutional law; (c) working out the basic principles for applying the comparative method to various branches of Soviet law; (d) preparing proposals for improving Soviet legislation and the structure of state administration, and (e) training comparatists. The Institute of State and Law of the Ukrainian Academy of Sciences also formed a sector in June 1969 to deal with the international legal activities of the Ukraine and with comparative constitutional and administrative law [*gosudarstvovedenie*]. At a comparative law conference held in January 1970 by the All-Union Scientific Research Institute of Soviet Legislation, which is a part of the USSR Ministry of Justice, the need for more comparative investigations of Soviet law was stressed.

1. W. E. Butler, *Comparative Criminal Law Within the Soviet Union: A Review* (1973), 1 Dalhousie L. J. 356.

The present volume, collectively authored, is published jointly by three Institutes: the Institute of Philosophy and Law of the Uzbek Academy of Sciences, the All-Union Scientific Research Institute of Soviet Legislation, and the USSR Academy of Sciences Institute of State and Law under the editorship of A.I. Ishanov, Sh.Z. Urzaev, I.S. Samoschchenko, A.A. Tille, M.M. Faiziev, and A.F. Shebanov. It consists of four chapters treating respectively: (I) General Problems of Comparative Law; (II) Socio-Political Bases of the Unity and Peculiarities of USSR and Union Republic Legislation (both written by A.A. Tille and M.M. Faiziev); (III) Methodological Bases of the Comparative Study of Union Republic Legislation (A.F. Shebanov and Faiziev); (IV) Comparative Investigations of Individual Branches of Union Republic Law, including constitutional law (Faiziev and A.A. Karimova), civil law (A. Iu. Kabalkin), family law (A. I. Pergament), labour law (T. S. Sagdullaev), criminal law (V.I. Ivanov), and correctional labour law (L. G. Krakhmal'nik).

The usefulness of comparison as a method of legal research, after what are described as "warm" discussions in the 1950-60s among socialist jurists, would now appear to be beyond serious question in the Soviet Union. Mr. Tille is a bit apologetic for touching upon basic questions of methodology, placing the comparative method firmly among the general principles of scientific thought together with analogy, experiment, deduction, induction and others, but he believes the renewed interest among Soviet jurists in comparative law naturally leads to a restatement, if not re-evaluation, of its basic aims. He is of course at pains to insist that the comparative method need not be limited to the study of two or more legal systems, as it is equally applicable to investigations into Soviet law. This is not such a remarkable view. Many North American jurists are among those who have claimed that comparative studies have been nurtured by interest in the inter-provincial or inter-state legal concerns, and there is an increasing realization that the comparative method can provide useful insights into the international legal system. But in its Soviet context the issue does have some peculiar facets which should be pondered.

There exist in a sense two inclinations in Soviet legal doctrine. One is to stress the monolithic unity of the Soviet state and its legislation. While acknowledging the existence of differences or peculiarities in union republic law, this view regards them as insignificant and not meriting special attention. A typical example is

to be found in a recent criminal law treatise:

The system of the Special Part of the now prevailing union republic criminal codes is basically identical, although there are certain differences which are not of principle nor substantive. They relate to the consecutive placement of chapters and to the positioning of individual crimes by chapters. Moreover, there are differences in defining the constituent elements of specific crimes and their punishments.²

The contrary inclination, utilizing the same data, believes the statement quoted above is illogical. If different orderings of chapters and articles in a code are to be dismissed as inconsequential, then what significance, they argue, does the system of the code have? And if differences in the constituent elements of and punishments for a crime are not important, has not the very science of criminal law been cast aside? As expressed in another criminal law text:

...there are substantive differences in many norms of the Special Part established by individual republic criminal laws. These differences reflect not merely nationality, local, and other peculiarities connected with the historical development of these republics, but also reflect the will of union republics as sovereign states.³

Much obviously must depend upon one's notion of what is consequential, why the differences do exist, and what is to be accomplished by studying them in a comparative framework. The present USSR Constitution of 1936 in its original redaction contemplated the enactment of federal or all-union codes of law; these would replace most republic codes of the 1920s and reflect the enhanced powers accorded to the central government under the constitutional reforms. Despite the preparation and discussion of many drafts, the federal codes were never enacted, and in February 1957 the USSR Constitution was amended so that union republics would enact codes of law appropriate to their circumstances but at the same time not inconsistent with all-union fundamental principles of legislation whose provisions were imperative throughout the land. This was, one may say, an expressly sanctioned diversity

2. N. I. Zagorodnikov, in *Ugolovnoe pravo. Chast' Osobennaiia* (Moscow, 1968) at 17. The learned author does not raise the issue at all in his recent study, *Sovetskoe ugolovnoe pravo. Obshchaia i Osobennaiia chast'* (Moscow, 1975).

3. See M. I. Iakubovich in N. I. Zagorodnikov, M. I. Iakubovich, and V. A. Valadimirov, eds., *Sovetskoe ugolovnoe pravo. Chast' Osobennaiia* (Moscow, 1965) at 7.

within what is conceived as a coordinated relationship in spheres of competence between the central and union republic authorities; there also exists tolerated diversity between all-union and union republic legislation that is reflected in a helter-skelter of normative acts at all levels.

The fundamental premise remains intact, however, that despite its "complexity", the Soviet Union as a federated state is "characterized by a unity determined by the socio-political and economic unity of the socialist social and state system." (p.68). This is seen in the close proximity of the texts of the respective all-union and union and autonomous republic constitutions, in the principle that all-union legislation is superior to that of the union republics, in the use of fundamental principles to lay down imperative all-union rules and bring conceptual unity to union republic codes, and, on the practical level, schemes whereby all-union organizations review and advise at the drafting stage on codes or other legislation of the union republics.

This unity, or "fact of monolithic unity", as some Soviet jurists call it, "in substance and form", (p.75) is said to exist not in a *federal* state but in a *federated* union of fifteen sovereign republics, who express their sovereignty in part by legislating within the competence not reserved to the central authorities. Textual comparisons of union republic legislation — and the evidence of union republic originality is exclusively of this nature in the present volume — suggest the differences are legion. Criminal legislation already has been alluded to above; less than half of the articles in the union republic civil codes coincide, and only 61 of the 329 articles in the RSFSR code of Civil Procedure have exact counterparts in the other union republics. Family legislation also exhibits many differences.

As for the origin and importance of such differences, there is not consensus among the authors. Some are attributed to editorial deficiencies or inaccuracies, which is perhaps somewhat surprising given the amount of consultation and advice available to union republic drafting commissions. There is a time factor involved as well; the union republic codes are not enacted simultaneously and hence some may reflect developments in subsequent legislation, legislative technique, legal doctrine, Party policy, and so forth. In some instances there would appear to be genuine disagreements among drafters as to what is the best formulation of an article or the best resolution of a particular problem. Indeed, the Soviet legal

system would appear to offer an excellent arena for experimentation with various legal solutions in different union republics,⁴ but there is no indication in this volume that the search for the best approaches has been deliberately undertaken in this fashion.

Local conditions and national peculiarities also are diversely assessed as an element responsible for divergencies among the codes. In their comparative historical analysis of union republic constitutions, Faiziev and Karimova point to both terminological nuances among the constitutions reflective of national and cultural differences and to the fact that the Central Asian union republics advanced directly from feudalism to socialism, omitting the capitalist phase, which also accounts for distinctiveness in constitutional provisions. But the message of their comparative research is that such divergencies may no longer be necessary and new constitutions should be in greater accord than even the present models.

Family law would seem to be a prime example of union republics adapting their codes to national traditions and mores. But one recent Soviet study challenges the assumption that differences in family legislation are chiefly attributable to such factors.⁵ A. I. Pergament, on the other hand, regards differences among the republic codes in the minimum marriageable age as dependent "wholly on nationality and local conditions." But the familiar explanation that Central Asian and Caucasian girls "ripen earlier" is rejected. It is not physical or climatic factors but social mores that are said to be decisive; it is suggested, for example, that a young marriage in European Russia is not likely to interfere with the bride's schooling, whereas in Central Asia the husband is likely to insist his bride leave school.

There are very few references to judicial practice in the study. Pergament does call attention to Article 23 of the Kirgiz Family Code, which is the only union republic code expressly to empower courts to recognize separate ownership in property acquired during a marriage by one spouse but after marital relations had in actuality ceased. In most other republics the same result is reached by the

4. The 1965 economic reforms in the management of the national economy were tried on a pilot basis for several years in order to evaluate their potential effectiveness.

5. V. I. Li, *Novaia kodifikatsiia zakonodatel'stva soiuznykh respublik o brake i sem'e (opyt sravnitel'nogo issledovaniia)* (Moscow, 1972). (diss. kand. iuridicheskikh nauk).

courts, though by other means: the property so acquired is recognized as jointly owned but an exceptional departure from the principle of equality is permitted to allow the transfer of property to the spouse who acquired it during the period of separate residence. Pergament thinks the Kirgiz rule should be inserted in all the family codes. No explanation is offered as to why the Kirgiz drafters chose to include the rule in the first place.

Having convincingly demonstrated the usefulness of comparative enquiries into Soviet law, the authors refrain in this volume from seeking a consensus as to what objectives Soviet comparative studies should ultimately pursue. This is perhaps a more crucial issue in the USSR, where much, if not most, legal research is carried on in pursuance of plans confirmed within state-funded institutions or commissioned expressly by government agencies. In theory at least research should be conducted in needed areas and the results used in the policy process. Among the possible areas of concentration alluded to in passing is the identification of "unjustified" differences in union republic legislation. This is a "federalist" orientation and is especially pronounced in constitutional and economic law.⁶ Unjustified differences presumably would become candidates for a unification of law on the issues in question. What is commonly called descriptive comparison is strongly urged and apparently still at a low level of development. Making Soviet law students and jurists aware of substantive differences in union republic legislation through classroom instruction and textbooks would seem to be at an early stage; the RSFSR is still taken as the basic model. Finding "gaps" in legislation promises to be a fruitful application of the comparative method within Soviet law. The authors of this volume call attention to several, chiefly through textual comparison, but seem surprisingly reluctant to probe further in order to assess the significance of these gaps through empirical investigations of judicial practice or social relations.⁷ There also is some suggestion that union republic

6. Economic law is not discussed in this study, but concern over unwarranted divergencies in legislation regulating the national economy and a rejection of the fundamental principles-union republic code approach is manifest in discussions of the draft USSR Economic Code. The drafters strongly support an all-union code for this branch of law, as exists for air law, merchant shipping and rail transport. For the text of the introduction to the draft economic code and extracts of provisions, see *12 Soviet Statutes and Decisions* (1976).

7. There is no objection in principle, it would seem, against broadening comparative research to include empirical assessments of the law. A recent Letter

legislation and experience have something to teach other countries. The legal model of the Central Asian union republics is regarded as relevant to the People's Republic of Mongolia,⁸ and presumably to many third world states.

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of the USSR Ministry of Justice to all USSR ministries and departments containing "Recommendations Relating to the Preparation of Normative Acts of USSR Ministries and Departments", approved October 16, 1975, stipulates that when preparing draft legislation, ministries and departments should study "the practice of applying prevailing normative acts, as well as data from sociological and other research if such has been done; if necessary, one should perform such research aimed at disclosing the effectiveness, economic cost, and usefulness of prevailing acts and the optimal directions for improving them. In addition, . . ." "one should study union republic legislation, decisions and recommendations of the Council for Mutual Economic Assistance, international treaties, legislation of foreign countries, and other documents" (point 17). See [1976] *Biulleten' normativnykh aktov ministerstv i vedomstv* (No. 1) at 43-48; translated in 12 *Soviet Statutes and Decisions* (1976).

8. A basic text on Mongolian criminal procedure collectively authored by Mongolian jurists was published by a Moscow publishing house in the Russian language. This was an original edition, not a translation. See Zh. Avikha and V.E. Chugunov, eds., *Ugolovnyi protsess Mongol'skoi narodnoi respubliki* (Moscow, 1974).

Theory of International Law. By Grigorii I. Tunkin. Translated, with an Introduction, by William E. Butler. London: George Allen and Unwin Ltd., 1974. Pp. xxv, 447 with Bibliography, Glossary, Tables and Index. Price: £8.00.

When one considers how East-West relations have dominated the international politics of the post-Second World War world, it is astonishing that so few important works such as this have been translated into English. This volume, first published in Moscow in 1970, is the work of the foremost theoretician of international law in the Soviet Union today. Academician Tunkin's translator, Professor William E. Butler of University College London, correctly describes the treatise as, "the most profound and comprehensive study of international legal theory yet produced by a Soviet jurist." (p.xv). That, if nothing else, should attract for this book a wide and important audience.

Academician Tunkin is an erudite man; few international lawyers, particularly those trained in the common law tradition, are able to draw so fruitfully on such a wide range of scholarly materials. One does not have to read far into this book to realize that Academician Tunkin is first and foremost a diplomat, a practising international lawyer; indeed, he may be described as a black-letter law man of the finest kind.

Most of the pressing theoretical questions concerning the nature of international law are discussed including the nature of customary international law, its relationship to treaty law, the legal nature of resolutions of the United Nations, the role of the International Court of Justice in the development of international law, the nature and function of "general principles of law" as described in the Statute of the ICJ, the relationship of law and diplomacy or politics and the nature and function of international organizations today.

The treatment by Tunkin of the difficult problem of the development and identification of customary international law is interesting and does much to dispel the widely-held view in North America that little regard is had for customary international law in the Soviet system. Certainly, the author expresses the standard Soviet view that treaty law is today more important and satisfactory as a means for the progressive development of international law but most practising Canadian international lawyers would undoubtedly express a similar preference if pressed. On the other hand, his scientific positivist approach to law sounds a little quaint when he shifts to international adjudication and says boldly of the ICJ that "The Court does not create international law; it applies it" (p. 191). This viewpoint may appeal to those who wish to make a priestly class of those who "apply" the law but does not conform to most modern views on the nature of the judicial process.

One of the most interesting sections of the book for North Americans is the critique of Myres McDougal who is accused of having "drown[ed] international law in policy." (p. 297). All lawyers are (or should be) aware of the almost imperceptible line between law and politics and the ease with which one can stumble into error by emphasizing one over the other to the extent of creating a serious imbalance, especially when the over-emphasis is in the policy or political direction. Even Lester Pearson can be criticized for fudging the problem and not leaving an adequate place for international law in international relations (pp. 285-6).

The book is uneven in places, particularly where Academician Tunkin takes time to give "card-index" summaries of the views of various jurists on certain points. A less quantitative and more qualitative approach would have been more rewarding for the reader, although one cannot but admire the obvious hard work which has gone into the collection of the materials. For example, some of the writings of such luminaries as J. F. Dulles and W. Knowland are as in need of "correction" as some of the "clarifications" which Tunkin makes in the writings of Soviet jurists of the pre-Khrushchev era.

Despite some forays into the sophisticated terminology used by communist lawyers in analyzing international law from an ideological point of view, the book remains remarkably free of ideological jargon and will have an appeal to a wider world audience as a result. Academician Tunkin's work is required reading for every international lawyer who is interested not only in Soviet international legal theory but in the ideas of one of the handful of theoreticians at work in international law today.

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Canadian Tort Law: Cases, Notes and Materials. By Cecil A. Wright and Allen M. Linden. 6th ed. Toronto: Butterworths, 1975. Pp. xxx, 768. Price: \$39.50 (cloth), \$25.00 (paperback).

This brief review is divided into two separate but inter-related parts. In the first I will deal with *Canadian Tort Law* from the perspective of a front line user of the product, *i.e.*, as a torts teacher who has used this text and its previous editions for a number of years. In the second I will propose that certain substantial additions be made to this volume in order to maximize its value.

At the outset I wish to make it clear that I greatly admire this casebook and have always enjoyed teaching from it. It reflects in large measure Professor Linden's infectious enthusiasm for his subject which, when added to this area of the law's inherent interest, makes it a highly readable as well as a highly instructive book. Several years ago the author paid a visit to the Faculty of Law

at Dalhousie and spoke informally to the student body.¹ His remarks, with customary exuberance, were entitled "Long Live Torts!" As is to be imagined he ranged far and wide — torts as ombudsman, torts and deterrence, the educational role of torts, the psychology of torts, *etc.* When he had finished he invited comments and the first was, "You have told us a lot of reasons why torts should survive. I can tell you why it should survive in the first year curriculum — it's fun!" As a teacher I too find torts fun, in large measure because of the general excellence of this casebook.

As its sub-title "Cases, Notes and Materials" indicates, this book is much more than a mere collection of cases but includes, as well, very valuable extracts from law review articles and treatises, law reform commission studies, and statutes and regulations. The notes which interconnect the major cases are well organized and challenge the reader with pointed and perceptive questions. Each chapter has a particularly valuable introductory section which outlines in broad terms the matters to be dealt with therein and most chapters conclude with a useful review problem.

The book's arrangement is traditional in that it starts with the intentional torts and their defences and then moves in a systematic way through negligence and strict liability. I particularly approve of the decision to plunge students straight into the central standard of care question leaving duty until later; the sixty page chapter devoted to damages; the very full chapter on products liability which provides an excellent opportunity for review and consolidation and the fifty page closing chapter on automobile accident compensation and the future of torts. There is also a fine introductory chapter which, as the author points out, can be read with profit both at the start and again at the completion of the course.

Technically this book is well put together with relatively few errors. However, the index is weak and confusing. This can be a serious problem if the subject is not dealt with in a predictable place in the text. For example, there is no entry for "limitation period" which is to be found in a section on "Necessity of damage"; nor is there one for "punitive damages" or "exemplary damages" which is dealt with, not in the chapter on damages, but in a note in the

1. He later spoke at a conference organized by the Public Services Committee. See, "Current Developments in No-Fault Automobile Insurance" in H. N. Janisch, ed., *Recent Developments in Torts and Automobile Insurance* (Halifax: Dalhousie University Faculty of Law, 1974) at 73-93 (Dalhousie Continuing Legal Education Series, No. 5).

chapter on intentional torts; nor is there one to “*per quod servitium amisit*” or “loss of services” a matter which is to be found (with luck) in the notes on economic loss. A more startling omission is the lack of any reference at all to “custom” although there is, in fact, a good section on that subject included in the chapter on standard of care. Good use is made throughout of the *Restatement of Torts, Second*, although one might have expected a suitable explanatory note for Canadian students. Incidentally, a delightfully provocative typographical error which referred to the “Replacement of Torts, Second” has not been repeated in this edition.

Let me turn, now, to some more serious matters. All law teachers, and perhaps torts teachers in particular, have their own pet cases. Therefore, any new edition of a casebook threatens old and true friends with demotion to the notes. Such, over the years, has been the fate of a number of cases which this reviewer feels are of sufficient pedagogical value to warrant continued prominence. For example, his much beloved *Penfolds Wines*² is now summarily dismissed as a “nightmare of a case” and given a scant ten lines of text. What then is to happen to that bottle of the appropriate Australian wine which, until this year, was flourished in graphic pantomime fashion in an effort to illustrate the difference between trespass to chattels and conversion? How can one now honestly reply in the affirmative to one of those earnest questionnaires as to the employment of “multi-media and other teaching aids”? What of *Halifax-Dartmouth Bridge Commission*³ which graphically demonstrated how three judges could separately arrive at the same conclusion *via* trespass, negligence, and *Rylands v. Fletcher*? Moreover, for a teacher in Halifax this latter case has the great advantage of involving a prominent local landmark and not some far off railway platform in New York, cricket ground in London or wharf in Sydney.

Nor do I fully understand why such excellent teaching cases as *Halushka v. University of Saskatchewan*⁴ or *Cudney v. Clements Motor Sales Ltd.*⁵ should have to be severely pruned and confined to the notes. I would also urge that the famous “misdelivered parcels

2. *Penfolds Wines Proprietary v. Elliott* (1946), 74 C.L.R. 204 (H. C. Aust.).

3. *Vaughn v. Halifax-Dartmouth Bridge Commission* (1961), 29 D.L.R. (2d) 523 (N.S.S.C.).

4. (1966), 53 D.L.R. (2d) 436 (Sask. C.A.).

5. [1969] 2 O.R. 209 (Ont. C.A.).

case'', *Turner v. Thorne*,⁶ which stands for the striking proposition that a trespasser to land is liable for all harm which flows from his trespass, is worthy of greater prominence than given it — especially if it is intended to contrast this position with the proximate cause of negligence. It would also be my view that the section on "Cause-in-Fact" would be strengthened by promoting *Kauffman v. TTC*,⁷ and that *Videan*,⁸ the heroic stationmaster case, be included at the start of the section on rescue so as to lay the foundations for the subsequent discussion as to whether a rescuer is owed a derivative or an independent duty of care. Finally, I would suggest that in an unnecessary effort to bolster the chapter on "Products Liability", *Rivtow Marine*⁹ has been wrongly treated as a products case and not as a significant development in the whole broader issue of recovery for economic loss.

It has been my experience in teaching torts that some functional exposure to the history of the shift from trespass to negligence is essential to give students an overview of where we are going. I have found that Charles Gregory, "Trespass to Negligence to Absolute Liability"¹⁰ admirably serves this purpose. An edited version of this article might usefully be employed at the outset of the negligence section. The refusal of the Supreme Court of Canada to take the opportunity presented it in *Goshen v. Larin*¹¹ to decide, once and for all, whether trespass should survive in Canada, is going to be the bane of torts teachers for some time to come. I would suggest that cases such as *Hollebone v. Barnard*,¹² *Dahlberg v. Naydiuk*¹³ and *Goshen v. Larin* cannot simply be summarily dismissed as "holdovers from days gone by". Indeed, to the extent that they shift the onus of proof immediately on to the defendant they may be more closely in keeping with current values than negligence cases.

In turning to the second half of this review I would start by pointing to the breadth of the title, *Canadian Tort Law*. In recent

6. (1960), 21 D.L.R. (2d) 29 (Ont. H.C.).

7. [1960] S.C.R. 251.

8. *Videan v. British Transport Commission*, [1963] 2 Q.B. 650 (C.A.).

9. *Rivtow Marine Ltd. v. Washington Iron Works* (1973), 40 D.L.R. (3d) 530 (S.C.C.).

10. (1951), 37 Va.L.Rev. 359.

11. (1975), 10 N.S.R. (2d) 66 (S.C., A.D.), *leave to appeal refused*, [1974] S.C.R. ix.

12. [1954] 2 D.L.R. 278 (Ont. H.C.).

13. (1970), 10 D.L.R. (3d) 319 (Man. C.A.).

editions this title has become quite misleading because nuisance and defamation are not included at all while vicarious liability, animals, occupier's liability and privacy, for example, are only covered in notes of uneven quality. It is my view that the author should be encouraged to expand his text to cover his title. Indeed, in this period of rampant statism, I would urge that a chapter be added on government liability which can be built on the existing sections dealing with the applicability of *Hedley Byrne* to government and the liability of municipalities for failure to maintain highways and the police for failure to warn of hazards on the highway. Such a chapter would also provide an opportunity for a full-scale treatment of the notorious omission case, *East Suffolk Catchment Board*,¹⁴ which in the present edition does not even have a separate existence of its own.

This proposal for an expansion in a basic first year casebook will provoke three readily predictable objections. First, how much can we expect first year students to absorb? We already have a seven hundred and sixty page casebook; your proposal will put it over one thousand pages. My answer is that each teacher will have to choose how much is to be covered as has already to be done by those of us who add supplements on nuisance and vicarious liability and cut back somewhat in other areas. This is precisely the sort of freedom which a really good and comprehensive casebook gives the individual instructor. Most importantly, it will give the student a single compact text which will provide him with a true working introduction to Canadian tort law. In response to the second objection, I cannot deny that this proposal would lead to an increase in price, but it seems to me that the additional value of comprehensiveness would more than offset the short term cost.

Finally, what of the objection that we should not devote even more scarce resources to a subject which is an anachronism in a welfare state? In reply I can do no better than refer such critic to the book itself. If torts is dying it is going out with a bang and not a whimper. It still provides our students with a feel for the common law's struggle for justice in individual cases as well as an introduction to a public law perspective through an analysis of statutory schemes for reform. Torts is without an equal as a first year course — especially when we are fortunate enough to have a

14. *East Suffolk Rivers Catchment Board v. Kent*, [1941] A.C. 74 (H.L.).

casebook of such quality that the only really serious criticism of it is that there is not enough of it.

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Critical Criminology. Edited by I. Taylor, P. Walton and J. Young. London: Routledge and Kegan Paul, 1975. Pp. xii, 268.

Critical Criminology is the sequel to *The New Criminology*¹, which appeared in 1973. In *The New Criminology* Ian Taylor, Paul Walton and Jock Young, three British criminologists, authored an inspired and provocative critique of the methods and philosophy of traditional criminology. There they argued that the perspectives of the dominant schools of criminological thought spawned a myopic insolence which dictated criminological method and necessarily precluded an accurate perception of deviance in contemporary social theory. What was required, they argued, was a paradigmatic shift of the discipline to accommodate alternative perceptions of social reality, particularly dialectical materialism.

Now, in *Critical Criminology*, Taylor, Walton and Young have attempted to expand upon this theme from *The New Criminology* by editing a series of essays designed to acquaint the reader with some of the fundamental literature of radical criminology, literature which goes beyond the "hip concerns" of the sociology of deviance² to the point of beginning to measure the parameters of critical criminology, the alternative approach to traditional criminology.³

The first essay, written by Taylor, Walton and Young, entitled "Critical Criminology in Britain: Review and Prospects" is little more than a restatement of some of the arguments from *The New Criminology*. It is the longest essay in the book and in many ways sets the tone for the remaining essays: it says nothing really new, it is brilliantly critical, but it offers no insight as to how the lofty

1. I. Taylor, P. Walton and J. Young, *The New Criminology* (London: Routledge and Kegan Paul, 1973).

2. I. Taylor, P. Walton and J. Young, *Critical Criminology* (London: Routledge and Kegan Paul, 1975) at 3.

3. *Id.* at 3-4.

objectives of a "materialist criminology"⁴ are to be implemented in the day to day world of either the academic or practising criminologist. It, in effect, urges criminologists to develop a criminology which is "normatively committed to the abolition of inequalities in wealth and power"⁵ without providing the building blocks with which to construct such a criminology.

This criticism of the lead essay should, however, be read against the fact that four of the remaining nine essays do provide reasonably clear directions for critical criminology. Jock Young's thoughtful essay entitled "Working-class Criminology" attacks deviance theorists (whom he calls voyeurs) and argues that deviancy theory, which surfaced in the 1960s as an alternative to conservative criminological thought, suffered from an inversion of the conceptual framework of its positivist opponents. He argues that what is needed for a truly new and innovative deviance theory is a rejection of this pattern of thought and the acceptance of an alternative approach utilizing new paradigms of thought. Only then will we be able to understand why, for example, people seem to be more disturbed by offences of the poor than offences of the rich, such as white-collar crime.

Herman and Julia Schmendinger's essay, "Defenders of Order or Guardians of Human Rights?", although it is primarily a critique of all positions in the "How shall we define crime?" debate which dominated criminological thought a few decades ago, challenges the criminologist to transcend the legal definition of crime and adopt a broader perspective on deviance by including in the definition of crime things which violate human rights, such as an imperialist war, racism, sexism and poverty crimes. They succeed in their limited purpose of suggesting realistically to criminologists that the blind acceptance of a legal definition to the limits of criminological enquiry is improper and that a criminological definition incorporating the intrinsic aspirations of people towards human rights is more appropriate.

The third essay which clearly complements the editors' lead essay is William Chambliss's "The Political Economy of Crime: a Comparative Study of Nigeria and the USA". Chambliss's approach is invigorating to the reader anxious to test the results of critical criminology against traditional criminology. He isolates

4. *Id.* at 44 *et seq.*

5. *Id.* at 44.

eight hypotheses from both functional theory and dialectical theory and tests them on empirical data from Nigeria and America. Not surprisingly, the dialectical hypotheses offer a more acceptable explanation of crime. Chambliss may be criticized for his selectivity in criminal statistics studied, but his point, which is that dialectical materialism can serve as an excellent research tool, is made well.

The final essay which appears to build upon Taylor, Walton, and Young's opening essay is Richard Quinney's "Crime Control in Capitalist Society: a Critical Philosophy of Legal Order". Quinney's now famous essay purports to analyze four approaches to knowledge: positivism, social constructionism, phenomenology and critical philosophy. His conclusion is, obviously, that it is time for a critical philosophy to emerge in the discipline, such as it is, of criminology.

The remaining five essays in *Critical Criminology* run to various themes. In "Prospects for a Radical Criminology in the USA", Tony Platt essentially gives Taylor, Walton and Young's lead essay an intensely personal and distinctively American application. Geoff Pearson attempts in "Misfit Sociology and the Politics of Socialization" to identify a cross-disciplinary contemporary approach to social problems which is "characterized primarily by an 'insider' perspective which many took for 'phenomenology', a ready sympathy for the underdog, and a theoretical tendency towards de-reification".⁶ He titles this approach "misfit sociology" and attempts in the essay to identify its radical components and demonstrate the characteristics which both link it to and divide it from critical criminology.

Three essays in *Critical Criminology* are devoted to an exchange of ideas between Paul Hirst and two of the editors of the volume concerning the proper meaning to be attributed to Marx and Engel's statements on crime. Hirst, unlike many critical criminologists, has clearly read Marx and attempted his own analysis of Marxian thought. Despite the editors' offhanded treatment of this series of essays in the introduction it is clear from their response to his first essay that Hirst's analysis did little to reinforce their self-perceptions as dialectical materialists. Hirst's first essay entitled "Marx and Engels on Law, Crime and Morality" points, somewhat embarrassingly to some radical criminologists, to Marx's views on crime during the various intellectual periods of his life and to his

6. *Id.* at 148.

occasional statements regarding crime and criminals which today fall far to the right of positivist criminology. Taylor and Walton respond to Hirst in an essay entitled, "Radical Deviancy Theory and Marxism: a Reply to Hirst". Their response, which clearly falls tragically below the level of scholarship attained in *The New Criminology*, lapses into personalities, fails to attend to Hirst's arguments and ends up by simply repeating a call for radical criminology. Hirst's final essay, "Radical Deviancy Theory and Marxism: a Reply to Taylor and Walton", restates his case clearly and concisely and calls Taylor and Walton to task for their unprofessional response to his arguments.

The Critical Criminology is likely to be one of those books which every aspiring criminologist will be required to read. In many ways that is unfortunate, for it clearly is not of the same quality as other works in this field. While it is true that most of the truly outstanding critical criminologists are heard from in *Critical Criminology*, it is also true that most of the essays offer nothing really new to the field and many are little more than reprints from other sources.

Nor can *Critical Criminology* be characterized as a collection of the outstanding works in radical criminology in one comprehensive and well-organized volume. The ten essays in *Critical Criminology* do not fall into the order in which they were presented in this review. They fall instead into what appears to be an almost haphazard pattern of random thoughts on critical criminology.

Critical Criminology is not a book which need be used by anyone with a basic working knowledge of the principles and arguments of radical criminology. In the final analysis, *Critical Criminology*, perhaps because of the natural tendency to compare it with its editors' brilliant predecessor, *The New Criminology*, is a most disappointing book. Tragically, it may demonstrate more the intellectual bankruptcy of radical criminology than its intellectual vitality. If *Critical Criminology* is the best that people of the calibre of Taylor, Walton and Young can do, then critical criminology may become just another footnote in the drab, positivistic history of contemporary North American criminology. Hopefully that will not be the case.

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Law and Society. By Adam Podgòrecki. London and Boston: Routledge and Kegan Paul, 1974. Pp. 302. Price: \$19.05.

The sociology of law has increasingly developed into a major theory of jurisprudence. Podgòrecki, a leading sociologist at the University of Warsaw, argues in his book "Law and Society" that the viability of a legal system is directly dependent upon the changing realities within society.

The book, the first written by Podgòrecki in English, revolves around two conflicting approaches towards the law: an acceptance of social behaviouralism coupled with a rejection of analytic legal positivism. As his central theme, he propagates that the study and functioning of law should depend upon a careful scientific investigation conducted into human behaviour. The law will progress as society develops. The form and content of the law will depend upon the socio-economic, cultural and political superstructure prevailing within society. Thus, the legal system will remain functionally ineffective if it fails to conform to socially acceptable morals, community habits and business practices. Podgòrecki accordingly submits that social norms dictate legal form and that legal effectiveness must be measured by its responsiveness to interdisciplinary realities.

The construction of a flexible and socially responsive role that should be possessed by a legal system carries with it an instinctive disdain for the analytical positivist premise that the law is a system which defines its own scope of operation without further recourse to sociological evaluation. The absolute, rigid and elevated rules of law postulated by analytical jurists like Kant and Austin are accordingly undermined by Podgòrecki's pragmatic examination of society's habits, customs and attitudes. The development of controls over human behaviour *via* the criminal process should thus echo the recidivist and societal responsiveness towards punitive and retributive, preventative and rehabilitative policies. As an example, Podgòrecki acknowledges that a clear rule which favours a particular form and method of criminal punishment, devised abstractly and without regard to relevant social circumstances, may provide the legal machinery with certainty and predictability. Nevertheless, this concise criminal rule may be ineffective simply because the strict norm will fail to acknowledge that society *mores* may disfavour the proposed criminal sanctions as unnecessary, unjust, inflexible or in conflict with social convention.

Podgòrecki argues that a legal system should *not* be based upon Austin's Command Theory or Kant's Categorical Imperative where a sovereign leader commands obedience from the subject by means of strict, arbitrary and incontestable rules. He contends that these generalized and conceptualized definitions developed by leading positivists fail to acknowledge that law has a far broader and more realistic content and scope. Viable law, for instance, may exist in a stateless community where no sovereign ruler prevails. So too the law may find its origin and support in social desirability rather than in an Imperative Command. Similarly, law is often obeyed, not on account of the legal sanction that it might carry, but instead on account of its acceptable social design. The essence and strength of the legal system, Podgòrecki therefore maintains, is derived from a scientifically established social acceptability of the law rather than from any formalized concepts of the legal validity and legitimacy of law reflected in rigid and arbitrary rules.

What functional form should the law assume? Podgòrecki submits, as did Huntington Cairns before him, that it is impossible to discover how law operates unless one has a greater knowledge of the factors that cause change in society and govern its evolution. The suitability and form of law aimed at controlling parental discipline over children, for example, all require the following sociological studies: an investigation of the uniformity of social sentiment towards legal control; the influence of such factors as age, income, sex, education and religion upon these social inclinations; the reasons and motives for such views; and finally, the significant influence of these sociological investigations upon the proposed legal innovations (p. 115).

The reliability of this purpose-oriented study will depend upon the form of the scientific methods used. The investigator's methodological tools may include a combination of the following: an historical, comparative and ethnographic study of social, cultural and political attitudes towards parental authority; an analysis of existing legal materials on this subject; and the use of questionnaires and interviews conducted with selected samples of the relevant community.

Podgòrecki informs us that a study of parental authority conducted in the United States along these scientific lines provided a series of conclusions of significance in the development of law governing parental discipline. The investigation established that males, Protestants, and educated and wealthy members of the

community tend to accept limitations upon parental authority more willingly than do women, Catholics or less educated and poorer members. Even more generally, the study displayed that parental authority is usually invoked to the child's advantage; that general public opinion supports statutory intervention so long as it provides for the appropriate rearing and education of children; and that the public favoured more autonomy for children than the existing laws actually permitted. The study revealed further that American legislatures are vulnerable to pressure from the wealthier and better organized pressure groups, bent on directing the law to favour their values. Judges tend to stress traditional social and cultural values on the subject of parental authority. And finally, the suitable form of legal regulation will depend, in addition to all the above, upon the intensity of social opinion and habit; the rational and emotional attitudes of the community towards the proposed legal innovation; as well as public awareness of the existing or suggested legal principles and rules governing parental authority.

The essential merits of Podgòrecki's approach towards law lie in his justifiable submission that a legal system that is unresponsive to community values and morality frequently lacks functional efficiency. The eminent author reiterates Ehrlich's demand that major advances in a legal system require an increasingly exhaustive analysis of the facts. Like Frankfurter's school of "Fact-Sceptics", Podgòrecki argues that rules are often inappropriately formulated and poorly applied in real situations simply because courts tend to misapply the facts in different legal contexts. A decision rendered on a question of marriage or divorce, communism or capitalism, would indeed be meaningless if no due regard were paid to the prevailing era, community values and persons being studied.

Podgòrecki is therefore justified in his primary recourse to fact study. A number of pertinent questions, however, arise as to the method and reliability of Podgòrecki's behavioural study and its importance in the development of a pragmatic legal system.

First, the dynamic open-ended character of Podgòrecki's interdisciplinary approach is as much a weakness as a strength. The sophistication of the fact study and analysis of society proposed by Podgòrecki depend upon a parallel sophistication of development within the social sciences themselves. Yet the normative sciences, such as psychology and sociology, as Podgòrecki himself admits, are still infant and as yet an inadequate foundation for convincing legal analysis. This reality is particularly evidenced by the fact that

the scientific methods advanced by Podgòrecki are far less reliable in a social science context than they are within the pure sciences. In mathematics and chemistry, for instance, the relevant variables are known and capable of laboratory experimentation. A study of human behaviour, on the other hand, involves many intangible variables that are incapable of controlled study and measurement. Questionnaire and interview methods produce far less reliable conclusions when compared to known chemicals mixed at particular temperatures with particular physical results occurring. Podgòrecki's desire to base law upon a study of society therefore remains an ideal to be striven for, but in the light of the above evidence, never quite attained.

Secondly, there are similar contrasting strengths and weaknesses in Podgòrecki's conclusive denial of a rule oriented approach towards legal development. It is true that arbitrary formal rules developed by the positivists may lack viability within a dynamic and demanding sociological environment. Nevertheless, when Podgòrecki stresses the need for law to conform to social demands, he ignores the fact that the prestige and respect for law can be traced in part to the independent and elevated character of the legal system. Independence of function, for instance, is one earmark of an efficient judiciary. Similarly, a logical and analytical reasoning method is a noticeable feature of the lawyer's training. This legal exposure to analysis is an indispensable element in perceiving the variant relevancies of fact situations and in translating them into mandatory or suppletive legal form. A study of sociology accordingly only supplements rather than displaces this analytical lawyering process.

Podgòrecki also fails to acknowledge that the functioning of a legal system may well extend beyond a mirrored reflection of social demands. Thus, the law may legitimately prescribe human behaviour in accordance with policies founded upon law and order and/or fairness to the individual even though a large contingent of society, motivated by ignorance or contrasting punitive interests, may unjustifiably condemn the legal result. Nor should we ignore that the ultimate basis of legal development lies in a choice among conflicting policies and interests. A choice must be made, for example, between a policy aimed at protecting wealth and a contrasting interest in avoiding human suffering created by inadequate bargaining skills. While sociological study may assist in this policy consideration process, the ultimate choice will invariably

lie in a philosophy of values. And it is the distinctive legal system itself, armed with its constant exposure to both formal law and social circumstances, that is best equipped to translate general policies into appropriate legal form.

Podgòrecki, in his contention that law depends upon the careful scientific study of sociology, also ignores the fact that a legal system may contain its own inherent fact study methods, existing independently of complex sociological methodology superimposed upon the legal system. The examination of witnesses, the use of experts in psychiatry and sociology, the indulgence of courts in precedent and comparative study are all illustrations of continual fact studies and sociological investigations that are part and parcel of any legal system. Podgòrecki's functional theory of law therefore fails to give full credibility to the innate capacity of a legal system to reflect realities without resort to complex behavioural studies.

Podgòrecki's book provides a valuable lesson in methods of fact study, so often ignored by legislatures, courts and lawyers. Yet, like so many other approaches towards law, the learned author propagates only one general descriptive method of legal development. Podgòrecki fails in his attempt to completely gainsay the positivist contention that law must be translated into a further prescriptive body of rules and concepts, developed and applied through an inherent training in strict legal analysis. The eminent author succeeds admirably, however, in his appeal for intensified studies into human behaviour as one means of developing a functionally effective system of legal rules and principles.

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